BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BENARD WITHERSPOON	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 177,467 & 195,853
NASH FINCH COMPANY	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant and respondent both appeal from an Award entered by Administrative Law Judge Kenneth S. Johnson on October 3, 1997. The Appeals Board heard oral argument March 25, 1998.

APPEARANCES

Claimant appeared by his attorney, Lawrence M. Gurney of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, James H. Morain of Liberal, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record and adopted the stipulations listed in the Award. At the time of oral argument, the parties also agreed that these two claims be treated as one accident.

ISSUES

The Administrative Law Judge awarded benefits for a 15 percent permanent partial general disability. The Award does not indicate whether the 15 percent is for work disability or functional impairment. Claimant contends he should be entitled to a higher work disability. Respondent contends claimant should be limited to a lesser functional impairment of 3 percent. The principal dispute on appeal concerns whether claimant made

a good faith effort to perform the duties of positions respondent offered claimant after his injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes the Award should be modified and claimant granted benefits for a 45 percent work disability.

Findings of Fact

(1) The parties have stipulated that claimant suffered a compensable back injury on February 22, 1993, (Docket No. 177,467) and a compensable aggravation of the back injury on May 11, 1993, (Docket No. 195,853). The ALJ treated the claims as one injury and, at oral argument before the Board, the parties agreed that the Board also treat them as a single injury.

(2) Claimant worked as a grocery selector at respondent's warehouse. He selected and stacked on a pallet the items necessary to fill the order from a given grocery store. The selector jobs were divided into dry goods selectors and freezer selectors. The heaviest items for a dry goods selector were 100 pound bags of sugar. The frozen foods selector uses a smaller jack and the heaviest items, based on later evaluation by vocational rehabilitation consultant Virginia Kuhlmann, were onion roll dough weighing 42 pounds, tripe weighing 62 pounds, turkeys weighing between 41 and 61 pounds, and blocks of ice weighing 48 pounds.

(3) Claimant, who had an earlier shoulder injury, had problems meeting his productivity requirements in February of 1993 and was encouraged to work faster. Claimant hurt his back lifting on February 22, 1993, the date the parties have treated as the date of accident for Docket No. 177,467. Claimant continued to do his regular job until March 7, 1993, when the pain increased.

(4) Respondent first sent claimant to Dr. Jack Reese and Dr. Reese released claimant to return to work. When his back problems continued, claimant went on his own to Dr. Richard L. Nevins. According to claimant, Dr. Nevins advised claimant to take two weeks off. Since Dr. Nevins was not an authorized physician, respondent sent claimant again to Dr. Reese who in turn referred claimant to Dr. D. F. Rhinehart. Dr. Rhinehart prescribed physical therapy. Claimant worked light duty while going to physical therapy. Claimant was released from physical therapy in late April of 1993 and then re-injured himself May 11, 1993, the date the parties have treated as the date of accident for Docket No. 195,853.

(5) Although the record is not entirely clear, it appears claimant continued to work in some capacity until August 1993. Dr. Rhinehart then recommended work hardening and

referred claimant to Dr. David Bailey. Claimant started work hardening in September 1993 and did not return to work until January 1994.

(6) In January of 1994, respondent placed claimant in its Temporary Alternative Duty Program. Claimant's duties included sweeping, cleaning off trailers, cleaning up ice in the freezer, and operating the forklift. While working in the Temporary Alternative Duty Program, claimant had problems cleaning and picking up one of the meat racks. Respondent again referred claimant to Drs. Reese and Rhinehart. After an MRI which showed a small hemangioma at L3, a finding he considered essentially normal, Dr. Rhinehart again released claimant to return to full duty in April of 1994.

(7) When claimant returned to full duty in April 1994, he bid into a freezer selector job. As a freezer selector, claimant was not able to meet the production requirements and frequently complained to his supervisor that he was in pain.

(8) Respondent's policy required that each employee do 90 percent of the production standard and failure to do so resulted in a progressive discipline. Claimant's production was between 60 and 62 percent and respondent first warned and then suspended him indefinitely at the end of June 1994.

(9) After the suspension, claimant requested a preliminary hearing and the ALJ sent claimant to Dr. Pedro A. Murati to determine if further treatment was necessary and, if not, to rate the claimant's impairment. Claimant saw Dr. Murati September 1, 1994. Dr. Murati determined claimant had reached maximum medical improvement and assigned an impairment rating of 3 percent to the whole body for chronic pain syndrome. After a functional capacity evaluation, he recommended claimant avoid occasional lifting more than 40 pounds, frequent lifting more than 30 pounds, and constant lifting more than 15 pounds. He also recommended claimant avoid pushing or pulling more than 300 pounds occasionally, 200 pounds frequently, or 100 pounds constantly. Finally, he recommended claimant avoid frequent standing, constant reaching, repetitive leg and arm movements, and indicated that claimant modify his squat and kneel movements.

(10) After receiving Dr. Murati's restriction, respondent consulted with Virginia Kuhlmann, a vocational rehabilitation consultant, for a job analysis. Based on her review of the jobs, she identified jobs which she felt claimant could do, in some cases after modification of the job, within the restrictions by Dr. Murati. She concluded the loading and unloading job would meet the restrictions but indicated a ramp would need to be pushed and pulled into position to load. She also felt claimant could do a sorter job so long as he did not have to bend for more than 2⅓ hours of an 8-hour day (at some places in the testimony this limitation is described as a limit to not more than one-third of an 8-hour day). Also, she felt claimant could do the freezer selector job so long as any items in excess of the 40 pounds were removed and, again, so long as claimant was not required to bend more than one-third of an 8-hour day.

(11) After the analysis by Ms. Kuhlmann, respondent offered claimant a position either in freezer selection with some sorting or, in the alternative, doing sorting and loading. Claimant chose the freezer selection/sorting job and returned to work January 15, 1995.

(12) Upon his return to work in 1995, claimant still performed only approximately 60 to 62 percent of the production standard. Claimant reported that his back and leg were hurting him and he did not believe he would be able to do the job. Respondent concluded it had no other jobs which would meet the restrictions.

(13) Claimant was examined and evaluated by Dr. Aly M. Mohsen at the request of claimant's counsel. Dr. Mohsen's report of June 8, 1995, was admitted by stipulation of the parties.

Dr. Mohsen stated his impression that claimant suffered from myofascial pain syndrome, multifidus triangle syndrome, bulging disc syndrome at L4-L5 and L5-S1 with a re-aggravation of his myofascial pain syndrome after his second accident in May of 1993. Dr. Mohsen rated the impairment as 12 percent of the body for the first injury and 5 percent of the body for the second for a combined impairment of 16 percent. Dr. Mohsen also recommended claimant limit lifting to 20 pounds on a constant basis, 20 to 25 pounds on a frequent basis, 25 to 30 pounds on an occasional basis. He advised claimant limit to occasional such activities as bending, stooping, and squatting.

(14) At the regular hearing held in this case in October 1995, claimant testified the freezer selection job required that he constantly bend and that he would have to bend approximately 80 percent of the time. Claimant also testified he would not be able to perform the duties of the freezer selector job.

(15) Claimant and respondent reached a settlement of this claim which they intended to finalize at a settlement hearing on September 3, 1997. At that hearing, claimant testified he would be able to perform the duties of the job respondent offered but that the production standards were "rigged" and racially discriminatory. Respondent has argued this testimony is inconsistent with claimant's earlier testimony that he could not do the job. After reviewing the testimony, the Board concludes claimant was not indicating he could meet the production standards.

(16) At the time of regular hearing on October 18, 1995, claimant was working as a high school assistant physical education aide. He was earning $5.10 per hour for 35 hours per week.

(17) Two vocational experts, Karen Crist Terrill and Jerry D. Hardin, testified about the impact the injury had on claimant's ability to work in the open labor market and earn wages comparable to those he was earning at the time of the injury. Ms. Terrill testified claimant had lost 15 to 20 percent of the labor market and, if he did not return to the job for respondent, his ability to earn comparable wages was reduced by 38 percent. Mr. Hardin

testified that the labor market loss was 70 to 75 percent and the wage earning loss 52 percent.

Conclusions of Law

(1) The law applicable to injuries at the time of claimant's two injuries defined disability in terms of loss of ability to perform work in the open labor market and earn wages comparable to those he earned at the time of the injury. K.S.A. 1992 Supp. 44-510e.

(2) Applicable law also provided that a claimant who earned a wage comparable to his/her pre-injury wage was presumed to have disability no greater than the functional impairment, *i.e.*, did not have a work disability. K.S.A. 1992 Supp. 44-510e.

(3) That same presumption of no work disability applies in cases where the claimant refuses to even attempt to perform comparable wage work he or she was capable of performing. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). On the other hand, a claimant who made a good faith effort but was unable to perform work offered to accommodate the injury would be entitled to work disability. Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

(4) As the Board understands the applicable cases, the decision to award work disability does not turn on whether the employer made a good faith effort to accommodate the restrictions. In this case, the employer did so. The question is also not precisely whether the offered work meets the medical restrictions, although this is a key consideration. Rather, the question is whether claimant has made a good faith effort to perform the work.

(5) The Board finds claimant made a good faith effort to perform the work respondent offered after the injuries but was not able to do the work fast enough to meet the production standard.

(6) The wage in the work offered by respondent should not be imputed to claimant and the Board finds claimant was not engaging in work at a wage comparable to the pre-injury wage.

(7) Giving equal weight to the wage loss and labor market factors as authorized in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), and giving equal weight to the opinions of Ms. Terrill and Mr. Hardin, the Board finds claimant has a 45 percent work disability.

AWARD

WHEREFORE, the Appeals Board finds that the Award entered by Administrative Law Judge Kenneth S. Johnson, dated October 3, 1997, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Benard Witherspoon, and against the respondent, Nash Finch Company, and its insurance carrier, Liberty Mutual Insurance Company, for accidental injuries which occurred February 22, 1993, and May 11, 1993, and based upon an average weekly wage of $575.60 for 23.71 weeks of temporary total disability compensation at the rate of $299 per week or $7,089.29, followed by 391.29 weeks at the rate of $172.69 per week or $67,571.87, for a 45% permanent partial work disability, making a total award of $74,661.16.

As of April 30, 1998, there is due and owing claimant 23.71 weeks of temporary total disability compensation at the rate of $299 per week or $7,089.29, followed by 235.58 weeks of permanent partial compensation at the rate of $172.69 per week in the sum of $40,682.31 for a total of $47,771.60, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $26,889.56 is to be paid for 155.71 weeks at the rate of $172.69 per week, until fully paid or further order of the Director.

The Appeals Board approves and adopts all other orders not inconsistent herewith.

IT IS SO ORDERED.

Dated this _____ day of April 1998.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Lawrence M. Gurney, Wichita, KS
James H. Morain, Liberal, KS
Office of Administrative Law Judge, Garden City, KS
Philip S. Harness, Director